IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

VICKY NILES, GUARDIAN AD LITEM FOR WHITNEY RENFRO, Plaintiff, vs. ROY JONES, MARK JONES and MONTE JONES, DBA ROUND TABLE PIZZA OF TAYLORSVILLE, Defendants.	MEMORANDUM AND ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT Case No. 2:03-CV-18 TS

This matter is before the court on the Motion to Dismiss or for Summary Judgment filed by defendants Roy Jones, Mark Jones and Monte Jones (the Individual Defendants).

UNDISPUTED FACTS

R.L.M. Investment, Inc. (R.L.M.) was incorporated on or about November 13, 1990. Roy Jones, Mark Jones and Lamont Jones, the Individual Defendants, are shareholders. R.L.M.'s Articles of Incorporation exclude shareholders from personal liability for actions

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taken by R.L.M. At all relevant times, R.L.M. maintained its corporate status by filing annual reports.

Beginning in March 1991, R.L.M. conducted business in Taylorsville as "Round Table Pizza of Taylorsville." Round Table Pizza of Taylorsville was a d/b/a of R.L.M. and was registered as such with the Utah Department of Commerce on November 28, 1990. However, that business name/DBA registration expired on November 28, 1996. From 1994 through all times relevant, "Round Table Pizza" was registered in Utah as a DBA of the Franchisor. Although the registration of the trade name "Round Table Pizza of Taylorsville" expired, R.L.M. continued, pursuant to its Franchise Agreement, to operate its business under that name as a franchisee of "Round Table Pizza."

R.L.M. employed Jeremy Jordan as the Manager of Round Table Pizza of Taylorsville. None of the Individual Defendants served as a manager of the Round Table Pizza of Taylorsville. From April 2002 through August 15, 2002, R.L.M. employed sixteen-year-old Whitney Renfro at Round Table Pizza of Taylorsville.

On January 3, 2003, Plaintiff filed the present action. The Amended Complaint alleges that during the summer of 2002, the manager sexually assaulted Ms. Renfro and asked her to spend the night at his house. It alleges that when she refused the manager's advances, he placed her on suspension from work and made sexual relations with him a condition of employment. Because she refused, she alleges that she was not allowed to return to work. For the purposes of this motion, the Individual Defendants do not dispute these allegations from the Amended Complaint.

Plaintiff's claims are all based on the alleged actions of the manager. There are no allegations that any of the Individual Defendants participated in the events at issue.

Plaintiff does not dispute most of the facts presented by the Individual Defendants, and instead disputes that: (1) Ms. Renfro was employed by R.L.M. rather than by the Individual Defendants; and (2) the inference that R.L.M. was doing business as a "Round Table Pizza."

DISCUSSION AND CONCLUSIONS

A. Parties' Positions

Plaintiff brings four causes of action: (1) sexual harassment under Title VII; (2) invasion of privacy/ intrusion on seclusion; (3) defamation; and (4)negligent hiring, training and supervision of the manager.

The Individual Defendants move for summary judgment on Plaintiff's first cause of because they contend that the undisputed facts establish that they are not individually liable for her claims because they were not her employer. In addition, they move to dismiss Plaintiff's second, third and fourth causes of action for their failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff contends that because R.L.M.'s trademark/DBA registration expired, the Individual Defendants are a partnership and are individually liable for the actions of the manager. Plaintiff also contends that her second, third and fourth causes of action state claims for which relief can be granted.

B. Standards for Considering Motion

The standard for considering a Fed. R. Civ. P. 12(b)(6) motion is as follows:

> [A]ll well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). "A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir. 1991).

Sutton v. Utah State School for the Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations partially omitted).

When considering a 12(b)(6) motion to dismiss, if the court considers matters presented by the parties that are outside the pleadings the court shall treat the motion as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(b). In so doing, all parties must be given a reasonable opportunity to present materials pertinent to such a summary judgment motion. *Id.* In the present case, Defendants' Motion notified Plaintiff that their submission of matters outside the pleadings on the first cause of action transformed their Motion on that cause of action to one for summary judgment. Def.s' Mem. at 2 n.1. Thus, Plaintiff received notice that the Motion was one for summary judgment on the first cause of action and timely opposed the Motion by listing controverted facts and submitting her own exhibit in opposition to the Motion. *See* Pl.'s Ex. 1.

The standard for determining a summary judgment motion is as follows:

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, we examine the factual record and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.
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> As the moving parties, defendants shoulder the "initial burden to show that there is an absence of evidence to support the nonmoving party's case." *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995). If defendants meet this burden, it falls to plaintiff to "identify specific facts that show the existence of a genuine issue of material fact." *Id.* "The party opposing the motion must present sufficient evidence in specific, factual form for a jury to return a verdict in that party's favor." *Id.*

Clinger v. New Mexico Highlands Univ. Bd. of Regents, 215 F.3d 1162, 1165 (10th Cir. 2000) (internal quotation marks and citation partially omitted).

C. Summary Judgment on Title VII Claim

Plaintiff relies on the case *Sterling Press v. C.L. Pettit*, 580 P.2d 599 (Utah 1978), for the proposition that in order to have the protection of the corporate veil when conducting business under a DBA, the corporation must have a valid registration. Plaintiff further contends that failing to have a valid registration renders the owners of the corporation personally liable on the corporation's debts. Plaintiff reads *Sterling Press* too broadly. In *Sterling Press*, two individual officers of a corporation were found to be personally liable for an insufficient funds check under the following circumstances: (1) those individuals signed the check; (2) their signatures were not accompanied by a designation that they were signing in any representative capacity; and, (3) the check showed on its face only the name of a company that was not registered as a trade name

of the corporation until after the lawsuit was filed. These facts are all distinguishable from the present case. Further, one of the statutes relied upon in *Sterling Press*, Utah Code Ann § 16-10-139 (persons who assume to act as a corporation without authority to do so shall be jointly and severally liable for all debts and liabilities incurred), was repealed in 1992.

Round Table Pizza of Taylorsville was an expired DBA when Ms. Renfro worked there. However, at all relevant times, "Round Table Pizza" was a properly registered DBA which the corporation, R.L.M., was authorized to use pursuant to the franchise agreement. Thus, although it no longer had a valid registration to operate under the name Round Table Pizza of Taylorsville, the Individual Defendants have presented evidence that the corporation was entitled to use the registered name of its Franchisor as a Round Table Pizza.

Plaintiff cites another Utah statute cited in *Sterling Press*, Utah Code Ann. § 42-2-5, which requires that any person, including a corporation, that carries on business under an assumed name file a certificate showing the assumed and true names. The purpose of § 42-2-5's certificate requirement is, as it was used in *Sterling Press*, to protect those who transact business with companies under the assumed name. *See Putnam v. Industrial Comm'n*, 14 P.2d 973 (1932)(decided under predecessor statute). There are no facts alleged in the Amended Complaint or in connection with the present summary judgment motion that could show that Ms. Renfro was confused or misled by her corporate employer's use of the DBA under the franchise agreement.

Plaintiff also contends that if a valid corporation is doing business under an expired trade name, it is converted into a partnership under Utah law. As noted above, the DBA Round Table Pizza was a validly registered DBA used by R.L.M. pursuant to its franchise agreement. Further, where the corporation is otherwise in good standing, it is not a partnership under Utah law, which excludes from the definition of partnership, "an association formed under any statute of this state," such as the corporation statutes. Utah Code Ann. § 48-1-3(2).

The Amended Complaint and the materials submitted in connection with the present summary judgment motion do not contain any facts which would support imposition of liability for Plaintiff's claims on the Individual Defendants simply because they are shareholders of R.L.M. Plaintiff argues that she disputes the Individual Defendants' evidence of the following: (1) that Ms. Renfro was employed by R.L.M. rather than by the Individual Defendants; and, (2) the inference that R.L.M. was doing business as a Round Table Pizza. However, Plaintiff fails to present evidence in opposition to the summary judgment motion that raises an issue of fact on either of these matters. Therefore, the Individual Defendants have shown undisputed facts that Ms. Renfro was employed by R.L.M. and that R.L.M. was doing business as Round Table Pizza.

Therefore, there being no issues of fact on the proposition that the Individual Defendants were not Ms. Renfro's employer, they are entitled to judgment as a matter of law on the Title VII claim.

D. Invasion of Privacy / Intrusion on Seclusion

Because Plaintiff has failed to show any issue of fact under which the Individual Defendants could be held liable as the employer, and because the Individual Defendants are not alleged to have participated in the alleged torts of invasion of privacy-intrusion on seclusion, the court will grant the Motion to Dismiss that claim as to the Individual Defendants for the failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

In addition, the court finds that Plaintiff fails to allege facts that would support a finding of public disclosure of private facts, necessary elements for an invasion of privacy claim. *See Shattuck-Owen v. Snowbird Corporation*, 16 P.3d 555, 558-59 (Utah 2000)(elements of claim of invasion of privacy by public disclosure of private facts). Similarly, there are insufficient facts alleged in the Amended Complaint that would support a claim for invasion of privacy based on intrusion upon seclusion. In *Stein v. Marriott Ownership Resorts*, 944 P.2d 374, 376-77 (Utah App. 1997), the court noted that case law has found "that sexual comments and brief touching could not support a claim of intrusion upon seclusion." (citing *Haehn v. City of Hoisington*, 702 F.Supp. 1526, 1531-32 (D. Kan.1988)). Accordingly, the invasion of privacy claims will be dismissed under Rule 12(b)(6).

E. Defamation

For the reasons stated above, there is no basis for imposing liability on the Individual Defendants for the actions of the corporation's manager, and the Amended Complaint does not allege that the Individual Defendants personally participated in the

events. Therefore, the defamation claim will be dismissed against the Individual Defendants for the failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

The defamation claim is based upon the allegation that a statement was made "to those associated with the restaurant" that Ms. Renfro was terminated because "she was not a good employee and/or that she was untrustworthy." Amended Complaint ¶ 35. It is not clear from the Amended Complaint who is alleged to have made the statement.

The allegation that Plaintiff was "not a good employee" is insufficient to show defamation. *Larson v. Sysco*, 767 P.2d 557, 560 (Utah 1989) (notation that employee fired for "poor performance" insufficient to show defamation *per se*). Further, the allegation that someone said or inferred that Plaintiff was "untrustworthy," even if it qualifies as slander *per se*, falls short of alleging when, where or to whom a statement was made. *Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp. 795, 799-801 (D. Utah 1988)(defamation complaint required to allege when, where and to whom the alleged defamatory statement was made). Accordingly, the Amended Complaint fails to state a claim for defamation.

F. Negligent Hiring, Training and Supervision

As noted above, the Individual Defendants have obtained summary judgment that it was the corporation R.L.M., and not the Individual Defendants, who employed Ms. Renfro and who operated the business. It is undisputed that it was the corporation R.L.M., who employed the manager. The basis of this claim against the Individual Defendants is the alleged failure to perform an adequate background check when hiring the manager, and to adequately train and supervise him. However, where the Individual Defendants are not

the manager's employer and did not operate the business, the negligent hiring, training and supervision claim against the Individual Defendants will be dismissed for the failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

It is well-established that the Utah Workers' Compensation Act is the exclusive remedy for an employee's claims of negligence, including negligent supervision. *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 786-87 (10th Cir. 1995).

Plaintiff attempts to distinguish this rule by claiming that her damages are not related to mental or physical injury and therefore not barred by the exclusivity of the Workers' Compensation statutes. *See Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991) (if employee's injuries are mental and physical in nature, they clearly fall within Workers' Compensation coverage and bar). Thus, the present claim for missed wages and benefits is barred by the exclusivity of the Workers' Compensation statutes unless it has no emotional or physical component. *See Mathews v. Kennecott Copper Corp.*, 54 F.Supp.2d 1067, 1076 (D. Utah 1999) (finding that expenses or losses incidental to mental injury from alleged negligent supervision, such as lost earnings resulting from the mental injury, should be dismissed as barred by Workers' Compensation Act). Where the Amended Complaint does not reveal whether Plaintiff's claim for lost wages and benefits is incidental to a mental or physical injury, it will not be dismissed pursuant to Rule 12(b)(6).

CONCLUSION AND ORDER

For the reasons stated above, summary judgment must be granted in favor of the Individual Defendants on the first cause of action, the second and third causes of action must be dismissed for the failure to state a claim and the fourth cause of action must be dismissed as to the Individual Defendants for the failure to state a claim. It is therefore

ORDERED that the Motion to Dismiss or for Summary Judgment filed by defendants Roy Jones, Mark Jones and Monte Jones, is GRANTED IN PART. It is further

ORDERED that summary judgment is granted in favor of defendants Roy Jones, Mark Jones and Monte Jones on Plaintiff's first cause of action under Title VII because they are not Plaintiff's employer. It is further

ORDERED that Plaintiff's second and third causes of action are DISMISSED with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). It is further

ORDERED that Plaintiff's fourth cause of action for negligent failure to hire, supervise and train is dismissed only as to the Individual Defendants for the failure to state a claim against the Individual Defendants.

DATED this 24th day of February, 2004.

BY THE COURT:

TED STEWART
United States District Judge

jmr

United States District Court
for the
District of Utah
February 24, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00018

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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